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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF LOS ANGELES and
DEPARTMENT OF WATER AND POWER,
Cross-Petitioners,

v.

PREFERRED COMMUNICATIONS, INC.,
Cross-Respondent.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff with no financial or technical ability to construct a multi-million dollar cable system has standing to challenge a municipality's cable franchising process solely because the plaintiff has a stated "desire" and "willingness" to construct such a system.

2. Whether the First Amendment compels a municipality to cede ongoing, non-transient use of its streets and rights-of-way to more than one cable operator simply because there is space to accommodate an additional system, notwithstanding the municipality's interests in minimizing the safety risks, disruption, and visual blight caused by an additional system, and in conserving the space for other uses.

3. Whether the constitutionality of municipal restrictions on the grant of cable television franchises should be reviewed under the " 'forum-based' approach for assessing restrictions that the government seeks to place on the use of its property," *International Society for Krishna Consciousness v. Lee*, —— U.S. ——, 112 S. Ct. 2701, 2705 (1992).

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioners, the City of Los Angeles and its Department of Water and Power, respectfully request that, if the Court grants the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by Preferred Communications, Inc., in No. 93-1570, then the Court should also issue a writ of certiorari to review the judgment of the court of appeals on the questions presented in this Conditional Cross-Petition.

OPINIONS BELOW

Cross-Petitioners incorporate by reference the "Opinions Below" section in the Petition for Writ of Certiorari in No. 93-1570.[1]

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[1] Copies of the district court's judgment and the Ninth Circuit's opinion are reproduced in the Appendix to the Petition and are not

JURISDICTION

The court of appeals rendered its decision on January 7, 1994. Pet. App. A53. The City received Preferred's Petition in No. 93-1570 on April 5, 1994, and the Court's jurisdiction over this Cross-Petition is invoked pursuant to Rule 12.3. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). As set forth below, however, the City contends that Preferred lacks standing, and that therefore this Court and the courts below lack jurisdiction.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

1. Article III, Section 2 of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases . . . [and] Controversies. . . .

2. The First Amendment to the Constitution is reproduced at Pet. App. A165.

3. Section 3(8)(a) of the Los Angeles City Charter, and City of Los Angeles Ordinance No. 58,200 are reproduced *infra* at Cross-Pet. App. 7a-20a.

STATEMENT OF THE CASE

A. Introduction.

In its Petition for Writ of Certiorari, Preferred Communications, Inc. ("Preferred") asks the Court to review that aspect of the decision of the Ninth Circuit Court of Appeals permitting the City of Los Angeles to regulate the construction and operation of cable television systems through a Notice of Sale ("NOS") franchising process. The court of appeals further held that the City could not

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reproduced here. References to the Petition will be cited as "Pet." References to the Appendix to the Petition will be cited as "Pet. App." References to the Appendix to this Cross-Petition will be cited as "Cross-Pet. App."

limit to one the number of cable operators serving a given area as long as the City's utility infrastructure could physically accommodate a second system. Pet. App. A60-64. The court remanded the case, instructing the City to initiate its NOS process to solicit bids for a second cable franchise for South Central Los Angeles. *Id.* at A70-71.

If the Court decides to review any of the questions presented in the Petition, the Court should also review the following questions, which are inextricably linked to those in the Petition: (1) Whether a plaintiff with no financial or technical ability to construct a multi-million dollar cable system has standing to challenge a municipal cable franchising process based solely on the plaintiff's stated willingness to do so, an approach that conflicts with *Nor-West Cable Communications Partnership v. City of St. Paul*, 924 F.2d 741 (8th Cir.), *cert. denied*, —— U.S. ——, 111 S. Ct. 2853 (1991); (2) whether the First Amendment compels a municipality to allow installation of hundreds of miles of permanent cable plant on its property as long as there is sufficient space to do so, a holding that conflicts with the principle articulated in *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *petition for cert. filed*, 62 U.S.L.W. 3670 (U.S. Mar. 24, 1994) (No. 93-1523); and (3) whether the constitutionality of municipal restrictions on the grant of cable television franchises should be reviewed under the " 'forum-based' approach" articulated by this Court in *International Society for Krishna Consciousness v. Lee*, —— U.S. ——, 112 S. Ct. 2701, 2705 (1992), for "assessing restrictions the government seeks to place on the use of its property."

B. The Facts About Preferred.

Preferred was formed in July 1983, two months before the complaint in this action was filed. Cross-Pet. App. 2a. Its only principals are a self-employed accountant, his brother who is a medical doctor, and a retired postal worker. *Id.* Preferred has never issued any shares of stock, and there is no written agreement regarding its

stock ownership. *Id.* It has no books or records of account and no written corporate bylaws, resolutions, minutes of directors' meetings, annual reports, profit and loss statements, financial reports, financial statements, budgets, or prospectuses. *Id.* Its sole "assets" consist of a "loan" by two of Preferred's principals and a $15,000 "investment" by friends. *Id.* There are, however, no written agreements or documents evidencing the existence of either of these "assets." *Id.*

Neither Preferred nor its principals have ever constructed, owned, or operated a cable system. *Id.* Nor have they ever constructed, owned or operated any other type of business related to television. *Id.* Preferred has not entered into any contracts for the planning or construction of the cable system it says it wants to build, nor has it retained any marketing consultants or anyone else to conduct marketing surveys relating to such a system. *Id.* Moreover, Preferred has not prepared, commissioned, or sought any formal marketing, financial or demographic studies or analyses relating to the cable system it allegedly intends to construct, nor has it determined what the anticipated capital costs, operating costs, or revenues of its allegedly planned system would be. *Id.* at 3a.

Throughout this litigation, Preferred has never disputed its failure to take any tangible step to plan or finance the construction and operation of a multi-million dollar cable system, arguing instead that it has no intention of taking any preparatory steps until it is granted a franchise. CR 174 at Exh. 3, pp. 9-13; CR 172 at Exh. 14, pp. 168-69.[2]

C. The Nature of Cable Television.

A cable television system consists of a street-by-street, house-by-house, distribution system of cables and equipment installed on utility poles and in underground utility conduits, much like electric, telephone, water, and gas systems. CR 170 at ¶¶ 7-9. Contrary to the allegations

[2] References to "CR" refer to the Clerk's Record in the courts below.

in the Petition (at 3), the record below makes abundantly clear that the poles and underground utility conduits, as well as the property traversed by aerial cable wires, are located on, over or under public streets and rights-of-way that are held by the City in fee or through permanent easements. *E.g.*, CR 445 at ¶¶ 5-8; CR 450 at ¶¶ 11-12; CR 452 at ¶ 6.

The facilities of the fourteen cable systems currently operating in Los Angeles occupy approximately 6500 plant miles of City streets and rights-of-way. CR 452 at 12. The mileage of City streets and rights-of-way occupied by cable systems is comparable to that of the traditional public utilities, the only other users of City streets of this magnitude. *Id.*; CR 444 at ¶ 13. Nearly 700 miles of cable plant have already been installed over and under City streets and rights-of-way in South Central Los Angeles, where Preferred claims it seeks to build a cable system. CR 452 at ¶ 12.

The hypothetical cable system Preferred says it wants to build in South Central Los Angeles would require the installation of approximately 700 miles of additional cable plant over and under City streets and rights-of-way. CR 174 at Exh. 11; CR 200 at ¶ 7. Preferred's own expert estimated that construction of a cable system in South Central Los Angeles would require an investment of at least $26 million. CR 174 at Exh. 11.

D. The Utility Infrastructure of South Central Los Angeles.

A cable system in South Central Los Angeles would be installed primarily on utility poles. CR 282 at ¶¶ 17-22. The cable system would be located on, over or under public streets and rights-of-way held by the City in fee or through permanent easements. CR 445 at ¶ 6. These rights-of-way constitute public property. *Id.*

By replacing some existing poles with taller ones, and rearranging the wires and equipment of the City's Department of Water and Power ("DWP"), the telephone com-

pany, and the existing cable operator, it would be physically possible to accommodate a second cable system in South Central. CR 282 at ¶¶ 28, 37. However, the South Central utility infrastructure could, at most, accommodate only two, or a very small, unspecified number of cable systems. *Id.* at ¶ 35. Moreover, the installation of a second cable system in South Central would effectively exhaust the capacity of the existing poles, thereby foreclosing future expansion of essential public utility services in South Central, unless a substantial number of poles were replaced or rearranged at considerable cost. *Id.* at ¶¶ 35-37.

The installation of a second cable system would substantially increase the safety hazards that occur with the installation and maintenance of cable systems, and would also increase the safety risks faced by DWP employees working on electric power facilities on the utility poles. *Id.* at ¶¶ 4-16. A second system would also substantially increase disruption to street traffic and private property, as well as increase the permanent visual blight that necessarily accompanies utility poles and wires. CR 159 at ¶¶ 1, 9, 10.

E. Alternative Means of Distributing Video Programming.

Alternative technologies exist to deliver video programming to the home. CR 170 at ¶ 16. None involves construction of permanent facilities on public streets and rights-of-way, and thus none requires a franchise from the City. *Id.* With the possible exception of broadcast television stations, each requires less capital investment than a cable system. *Id.* at ¶ 23.

F. The City's Franchising Process.

The Los Angeles City Charter provides that the City "may grant franchises for fixed terms . . . for the construction and operation of plants or works necessary or convenient for furnishing the City and its inhabitants with

transportation, communication, terminal facilities, water, light, heat, power, refrigeration, storage, or any other public utility or service." Cross-Pet. App. 7a. City Ordinance No. 58,200, enacted in 1927, long before the advent of cable television, establishes the method by which the City grants franchises. *Id.* at 8a. It requires any business seeking to "construct, maintain or operate" certain types of facilities "upon, over, in, under, across any street, lane, alley, court, highway, road or other place" to obtain a franchise. *Id.* at 8a, § 2.

Ordinance No. 58,200 has been applied to a wide range of activities that make non-transient use of City streets and rights-of-way, including street railroads, water, gas, and electric companies, pipeline companies, taxicab companies, and non-cable communications line companies, such as private data transmission lines. CR 444 at ¶¶ 11-13. By its terms, the ordinance also applies to cable television systems, since it it requires a franchise to construct or operate on "poles . . . conduits, wires or cable" on, over or under City streets or rights-of-way "for communication" or for "furnishing the city and its inhabitants with . . . communication. . . ." Cross-Pet. App. 9a at §§ 2(4), (5).

Regardless of the nature of the prospective franchisee's business, the procedure that the City follows in granting franchises is essentially the same. Ordinance No. 58,200 requires that any franchise be granted only through a Notice of Sale process, referred to as an "NOS." CR 444 at ¶ 39; Cross-Pet. App. 9a-12a. The appropriate City Department prepares the NOS, which includes minimum requirements and a draft franchise with proposed terms and conditions. CR 444 at ¶ 39. The appropriate Board of Commissioners, which consists of members of the public appointed by the Mayor and confirmed by the City Council, then considers the proposed NOS in public sessions at which the general public, including franchise applicants, may participate. *Id.* at ¶¶ 38-41. The Board then forwards its recommendation to the City Council,

where the matter is reviewed in public session by the Council Committee with jurisdiction. *Id.* at ¶¶ 38-41. The Committee reviews the Board's recommendation and forwards the matter to the full City Council, which also holds a public hearing. If the City Council approves, the NOS is published. *Id.* at ¶ 39.

Bids received in response to the NOS are first reviewed by the staff of the appropriate City Department, which prepares a report evaluating applications. *Id.* The staff report is forwarded to the Board of Commissioners, which then holds more public hearings, at which the Board makes a recommendation as to the highest responsible bidder. The Board then forwards the matter once again to the appropriate Council Committee for review and recommendation, which is also done in public session. The matter is then reported to the full City Council. *Id.* The Council holds a public hearing and votes on whether to grant the franchise. If it votes to do so, its decision is forwarded to the Mayor, who can approve or veto the Council's decision. *Id.*

In the mid-1970s the City developed a comprehensive master plan for cable franchising. CR 175 at ¶ 6. Using the NOS process described above, and relying on recommendations in the master plan, the City ultimately granted fourteen cable franchises, including one for South Central Los Angeles. CR 114 at Exh. A, at 5-6.

The City's cable franchising process has been governed by, and is in all respects consistent with, relevant federal and state law. It is similar in all material respects to the process by which most municipalities and counties across the nation have granted cable franchises. CR 175 at ¶¶ 13-14.

REASONS FOR GRANTING THE CROSS-PETITION

I. THE QUESTIONS PRESENTED HERE ARE INTERTWINED WITH THOSE IN PREFERRED'S PETITION, AND THE COURT COULD NOT FAIRLY OR ADEQUATELY RESOLVE THEM SEPARATELY.

As a threshold matter, of course, the Court is "obliged to examine [Preferred's] standing," even if the issue "is raised by neither of the parties." *Juidice v. Vail*, 430 U.S. 327, 331 (1977). Thus, if the Court is otherwise inclined to grant the Petition, it would be obligated to consider whether Preferred has standing. That obligation takes on greater significance here, since the Ninth Circuit's ruling on standing appears to conflict with the Eighth Circuit's decision in *Nor-West*, 924 F.2d 741.

Preferred asks the Court to review the portion of the court of appeals' decision upholding the NOS process used by the City to award cable television franchises. Pet. at 17 & 30. That question, however, cannot be meaningfully considered without first addressing the predicate issue resolved by the Ninth Circuit and raised by the City in this Cross-Petition: Whether the First Amendment compels the City to cede use of its streets and rights-of-way to more than one cable operator, simply because there is space available physically to accommodate an additional system, notwithstanding the City's interests in minimizing safety risks, disruption, and visual blight caused by an additional system, and in conserving the space for other uses.

Accordingly, if the Court is inclined to grant Preferred's Petition, it should grant the City's Cross-Petition as well.

II. THE QUESTIONS PRESENTED RAISE IMPORTANT QUESTIONS OF FEDERAL LAW THAT THE NINTH CIRCUIT RESOLVED IN A MANNER THAT CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Ninth Circuit's Holding That Preferred Has Standing Conflicts With A Decision Of The Eighth Circuit.

The district court and Ninth Circuit both concluded as a matter of law that Preferred has standing to pursue its claims for relief. *See* Cross-Pet. App. 5a; Pet. App. A57-58. However, in the context of granting the City's summary judgment motion on damages, the district court made findings of fact based on undisputed evidence establishing that Preferred is a paper corporation without any tangible assets or capabilities. Cross-Pet. App. 2a-3a. Specifically, the district court found that Preferred has no employees, no offices or equipment, no corporate books or records, and no documented assets. Moreover, its principals have no experience in the cable business, and the company has not entered into any contracts with anyone else who has such experience. *Id.* In short, the record reveals no evidence from which a rational fact-finder could infer that Preferred has the financial or technical ability to construct or operate a cable system.

The court of appeals did not disturb those findings. Relying instead on evidence of the self-proclaimed willingness of Preferred's principals to build a cable system, the court of appeals concluded that "[n]othing in the record here suggests that Preferred doesn't intend to build a South Central cable system if it's awarded the franchise." Pet. App. A58. Reasoning that invalidation of the so-called "one area/one operator" requirement would remove an obstacle to Preferred's receiving a franchise, the court of appeals held that Preferred had standing to pursue its claims. *Id.*

The Ninth Circuit's holding is in conflict with the Eighth Circuit's decision in *Nor-West*, 924 F.2d 741. In *Nor-West*, as in this case, a would-be cable operator challenged a municipality's failure to award a second, competitive cable franchise.[3] The Eighth Circuit held that a plaintiff lacks standing to challenge a municipal cable franchising process unless the plaintiff is both willing and financially able to build a cable system. Absent these attributes, a plaintiff simply is not "likely to benefit" from the grant of a second cable franchise. *Id.* at 749. In *Nor-West*, a jury had determined after a trial on the merits that the plaintiff—a company whose principals had far more substantial net worths than the principals of Preferred—was neither willing nor financially able to construct a cable system. *Id.* at 747-48. The Eighth Circuit held that the plaintiff therefore lacked standing to pursue its claims. *Id.* at 748-49.

The court of appeals attempted to distinguish *Nor-West* on the grounds that the jury there had found that the plaintiff was both financially unable and unwilling to compete for a second cable franchise. By contrast, the Ninth Circuit reasoned that there was evidence that Preferred was willing to compete for a franchise. Pet. App. A57-58.

The Ninth Circuit's distinction, however, is illusory. In *both* cases, the plaintiffs failed to demonstrate a financial ability to build or operate a cable system. The reasoning of *Nor-West* compels the conclusion that lack of financial ability alone is a sufficient reason to deny standing, because absent such ability, the plaintiff would not

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[3] The similarities between this case and *Nor-West* are no accident. The plaintiff in *Nor-West* was represented by the same counsel that represents Preferred here, *see* 924 F.2d at 743, and indeed, the original complaints in both suits were filed within days of each other. *Compare* 924 F.2d at 744 (*Nor-West* filed on September 2, 1983) *with* CR 1 (original complaint filed in *Preferred* on September 9, 1983).

have a "realistic chance" of benefitting from a decision to grant it a cable franchise. *Nor-West*, 924 F.2d at 749. By contrast, the Ninth Circuit's reasoning in this case removes financial ability from the calculus entirely, holding that a plaintiff's mere subjective intent is sufficient to confer standing, even in the complete absence of any objective evidence that the plaintiff has any ability whatsoever to construct and operate what it concedes to be a multi-million dollar cable system.

Thus, under the Ninth Circuit's approach, *anyone* would have standing to challenge a municipal cable franchising process simply by expressing a subjective "desire" or "willingness" to build or operate a cable system. This reasoning is not only at odds with *Nor-West*, but also with the principles articulated in *Lujan v. Defenders of Wildlife*, —— U.S. ——, 112 S. Ct. 2130 (1992). *Lujan* holds that the "irreducible constitutional minimum of standing" comprises three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' ". . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.". . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 2136 (citations omitted). Absent evidence from which a rational fact-finder could conclude that Preferred has a realistic chance of successfully financing, constructing and operating a multi-million dollar cable system, it is inherently "conjectural" and "speculative," as opposed to "likely," that Preferred's claimed injury—its inability to engage in the First Amendment activities of a cable operator—will be redressed by a favorable decision.

If allowed to stand, the Ninth Circuit's reasoning essentially gives the world at large standing to challenge a city's franchising process. After all, the "obstacle" whose removal the court of appeals viewed as significant—the City's "one area/one operator" policy—is no more an obstacle to Preferred than it is to anyone else's hypothetical ability to operate a cable system in South Central Los Angeles. Yet surely everyone does not have standing to challenge the City's franchising requirements simply because they express a subjective "willingness" to build and operate a cable system.

What the Ninth Circuit overlooked, and what the *Nor-West* court properly recognized, is that for a plaintiff to have standing to challenge a municipal cable franchising process, there must be sufficient evidence from which a rational fact-finder could infer that the plaintiff would have a "realistic chance" of doing what it claims the franchising process has prevented it from doing: Engaging in those aspects of cable television operation and programming that implicate the First Amendment. *See Nor-West*, 924 F.2d at 749 (quoting *Doherty v. Rutgers School of Law-Newark*, 651 F.2d 893, 902 (3d Cir. 1981)). To engage in those activities, however, a plaintiff needs much more than a franchise: It needs to be able successfully to build and operate a cable television system. Here, Preferred's own expert conceded that building and operating a cable system in South Central Los Angeles would require at least $26 million. CR 174 at Exh. 11; CR 200 at ¶ 7.

Because of the substantial financial resources and experience required to build and operate a cable system, the question of standing in cable television cases necessarily presents far different issues than the question of standing in cases involving most other, far less capital-intensive types of First Amendment activities. The simple economic fact of life is that not everyone has the resources or experience to engage in those aspects of cable system

operation that implicate the First Amendment. Thus, for the vast majority of the public, the inability to engage in such activities has nothing to do with municipal franchising, and cannot be redressed by any court.

If constitutional challenges to cable franchising are to be resolved in concrete controversies, as opposed to purely academic, speculative exercises on the First Amendment implications of cable franchising, then the plaintiff must possess some objective attributes from which a rational fact-finder might infer that it could successfully build and operate a cable system. Under the court of appeals' reasoning, however, it appears that standing must be conferred on "any stranger who might arrive in [Los Angeles] with the desire or wish to enter the [cable business] and who claimed that because of [the City's franchising process] he was prevented from doing so." *Duff v. Kansas City Star Co.*, 299 F.2d 320, 323 (8th Cir. 1962). Such a sweeping construction of the concept of standing is an open invitation to advisory opinions, and merits the review of this Court.

B. The Ninth Circuit Erred In Construing The First Amendment To Compel The City To Allow Installation Of Permanent Structures On Public Streets And Rights-Of-Way, In Apparent Conflict With A Decision Of The Seventh Circuit.

The Ninth Circuit held that, because the City conceded that it would be physically possible to install a second cable system on the City's existing utility infrastructure in South Central Los Angeles, the First Amendment prohibited the City from refusing to allow a qualified applicant to do so. In other words, the Ninth Circuit held that the First Amendment requires the City to permit a would-be franchisee to occupy hundreds of miles of City-owned streets and rights-of-way with permanent cable plant, even if the City wishes to conserve the space for other future uses, and despite the City's concerns about the increased safety risks, disruption, and visual blight caused by an additional system.

In this lawsuit Preferred argues that it has a constitutional right to construct 700 miles of cable plant using City utility poles, underground conduit, rights-of-way and easements. CR 174 at Exh. 11; CR 170 at ¶¶ 7-9; CR 445 at ¶ 6. Stated differently, Preferred claims that the First Amendment gives it the right to a "permanent physical occupation" of City property, the equivalent of a Fifth Amendment taking of that property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 428-29, 438 (1982); *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 99 (1893) (installing poles and wires will dispossess public "as if it had destroyed that amount of ground").

By holding that the City must permit the installation of at least one more cable system on City-owned property, the court of appeals' decision clearly conflicts with the principle articulated by the Seventh Circuit in *Graff v. City of Chicago*, 9 F.3d 1309. The Seventh Circuit held in *Graff* that "no person has a constitutional right to erect or maintain a structure on a public way." *Id.* at 1314. That case involved a First Amendment challenge to municipal regulations restricting the ability to build and operate a newsstand on public property. The Seventh Circuit held that the building and operation of a newsstand was "conduct, not speech, which the City can lawfully proscribe." *Id.* at 1315.

The Seventh Circuit contrasted newsstands with much less intrusive newsracks, which were the subject of this Court's decision in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988). The *Graff* court wrote:

> Newsstands are large, permanent-type structures. They are constructed, and once in place they are not easily moved. Newsstands do not present one viewpoint; rather they supply many and varying editorial opinions. . . . Newsstands also are more likely to obstruct the views of pedestrians and automobile drivers. In short, newsstands compared to newsracks

> are much larger, more permanent structures that occupy a significant portion of limited sidewalk space.

Graff, 9 F.3d at 1315 (footnotes omitted).

If a municipality may constitutionally prohibit the construction and operation of a single newsstand on a City sidewalk, then surely it may constitutionally prohibit the construction and installation of 700 miles of cable plant over and under its rights-of-way and streets. Using the language of the Seventh Circuit, cable television systems are "large, permanent-type structures. They are constructed, and once in place they are not easily moved." Cable television systems "do not present one viewpoint; rather they supply many and varying editorial opinions." Cable television systems are more likely than newsstands "to obstruct the views of pedestrians and automobile drivers," as well as homeowners. In short, compared to the newsstands at issue in *Graff*, cable television systems "are much larger, more permanent structures that occupy a significant portion of limited [City right-of-way and easements]." *Id.*

The Ninth Circuit mandated that the City permit a qualified bidder to construct and operate a second cable system on City-owned property. This holding conflicts with the holding in *Graff* that a municipality is not required to permit the construction and operation of a less intrusive structure, a newsstand, on municipally-owned property. Moreover, the Ninth Circuit's holding essentially sanctions a Fifth Amendment "taking" of public property by a private party. Such a sweeping interpretation of the First Amendment merits this Court's attention and review.

C. The Ninth Circuit Failed To Apply Forum Analysis, Which This Court Has Held Is The Proper Approach For Assessing Restrictions That The Government Places On Use Of Its Property.

As already noted, what Preferred seeks is the right to install hundreds of miles of cable plant on City property —specifically, the City's utility infrastructure, streets and rights-of-way. In *International Society for Krishna Consciousness v. Lee*, —— U.S. ——, 112 S. Ct. 2701, 2705 (1992), this Court made clear that "a 'forum-based' approach" is the proper analytical framework "for assessing restrictions that the government seeks to place on the use of its property." The Ninth Circuit, however, did not follow this Court's "forum-based" approach. Had the court of appeals done so, it would have been compelled to uphold the City's right to limit to one the number of cable operators serving a given area of the City.

If, as this Court held in *Krishna Consciousness*, the interior areas of a publicly owned airport are a nonpublic forum, then surely the City's utility infrastructure (to which Preferred claims a First Amendment right of access) is likewise a nonpublic forum. The City has consistently and sharply restricted access to its utility infrastructure, as well as to any non-transient use of its streets and rights-of-way, through the very NOS process that Preferred challenges in its Petition here. Moreover, there can be no question that, even more than the airport terminal in *Krishna Consciousness*, the City's utility infrastructure is physically separated from acknowledged public areas and thus "a special enclave, subject to greater restriction." *Id.* at 2706.

Because the City's utility infrastructure is a nonpublic forum, the City's right to restrict access to its utility infrastructure must be upheld as long as it is reasonable and "not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Id.* at 2705-06. Moreover, to be reasonable, restrictions on speech activi-

ties in a nonpublic forum need not be the "most reasonable" or the "only reasonable" restrictions. *Id.*

The City's policy of controlling access to the utility infrastructure easily satisfies this standard. It furthers the City's legitimate interests in preventing the exhaustion of the existing capacity of the South Central utility infrastructure, and minimizing safety hazards, disruption to streets and property, and visual blight. CR 282 at ¶¶ 4-16 & 35-37; CR 159, at ¶¶ 1, 9, 10. The Ninth Circuit recognized the legitimacy of these governmental interests, and it did not dispute that the City's policy furthered these interests. The court nevertheless found that the City's policy was not sufficiently narrowly tailored to advance those intertests. Pet. App. A60-64. The result, however, would have been different under forum analysis. This Court has previously held that these interests are reasonable, and are sufficient to justify restriction of speech in a nonpublic forum. *See U.S. v. Kokinda*, 497 U.S. 720, 729 (1990); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984).

Nor is there anything in the record to suggest that the City's policy is an attempt to suppress any speaker's activity because of the speaker's point of view. *Krishna Consciousness*, 112 S. Ct. at 2705-06. To the contrary, the policy has its genesis in Ordinance No. 58,200, which established the City's franchising process in 1927, long before the advent of cable television. Moreover, the record makes clear that the City's franchising process is not limited to cable television, but instead has historically been applied to all comparable non-transient uses of City streets and rights-of-way, including street railroads, public utilities and taxicab companies. The process requires input from the public at duly noticed public meetings at every stage (CR 444 at ¶¶ 38-41), and action by the five citizen members of the Board of Telecommunications Commissioners, the fifteen members of the City Council, and the Mayor, thus insulating against the possibility that

any government official could manipulate the process to discriminate against an applicant based on the applicant's views.

Because the Ninth Circuit's failure to apply forum analysis represents a substantial departure from the decisions of this Court in a matter of substantial importance to municipalities' ongoing ability to manage and control the use of public property, this Court's review is warranted.

CONCLUSION

If this Court grants Preferred's Petition for a Writ of Certiorari, it should likewise grant this Conditional Cross-Petition.

Respectfully submitted,

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May 1994

APPENDIX

[Filed May 23, 1989]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-5846 (CBM)

PREFERRED COMMUNICATIONS, INC.,
Plaintiff,

v.

CITY OF LOS ANGELES and DEPARTMENT OF WATER AND POWER,
Defendants.

ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S DAMAGES CLAIMS

This matter came on for hearing on March 20, 1989 in the above-entitled court, the Hon. Consuelo B. Marshall, Judge presiding, on, inter alia, the motion of defendants City of Los Angeles and Department of Water and Power ("defendants") for summary judgment as to plaintiff Preferred Communications Inc.'s ("plaintiff's") damages claims.

Having reviewed the relevant papers and documents and having heard oral argument, the Court hereby DENIES defendants' motion for partial summary judgment as to plaintiff's *compensatory* damages claims, however the Court GRANTS defendants' motion as to plaintiff's claims for lost profits and any damages claims other than for compensatory damages.

Pursuant to its ruling, the Court issues the following Findings of Fact and Conclusion of Law:

FINDINGS OF FACTS

1. Plaintiff Preferred Communications, Inc. was formed in July, 1983, two months before the initial complaint in this action was filed.

2. Preferred has no written corporate bylaws, resolutions, directors' meeting minutes, annual reports, profit and loss statements, financial reports, financial statements, budgets, prospectuses or books and records of account.

3. Clinton Galloway, Carl Galloway, and Perry Parks are Preferred's directors and Clinton Galloway, the only officer, is President.

4. Preferred has issued no shares of stock, and there is no written agreement showing the stock ownership of Preferred.

5. Preferred's assets consist of loan from Perry Parks and Clinton Galloway, and a $15,000 investment by a Russell Grisanti and a Donna Grisanti. There is no written evidence of these loans or investments.

6. Preferred has never constructed, owned or operated a cable television system. None of Preferred's principals, Clinton Galloway, Carl Galloway or Perry Parks, have had experience in the operation of a cable system.

7. Preferred has never constructed, owned, or operated any other type of system, station or facility for the production, transmission, retransmission or distribution of television signals.

8. Preferred has entered into no contracts with regard to the construction of a cable system, and it has not retained any marketing consultant or anyone else to conduct marketing surveys for it.

9. As of May 15, 1987, Preferred had not prepared, commissioned, or sought any formal marketing, financial or demographic studies or analyses relating to the cable system it allegedly intends to construct.

10. Other than the document authored and produced by Clinton Galloway on August 31, 1988, and referred to by plaintiff's agents as "the business plan," Preferred has no studies concerning the cost of construction of the cable system it allegedly intends to construct.

11. Any Finding of Fact deemed to be a Conclusion of Law shall be treated as a Conclusion of Law.

CONCLUSIONS OF LAW

1. If the non-moving party to a summary judgment motion bears the burden of proof with respect to an element essential to its case, and that party fails to make a sufficient showing to establish a genuine dispute of fact with respect to the existence of the element, summary judgment is appropriate. *California Architectural Bldg. Products v. Franciscan Ceramics*, 818 F.2d 1446, 1468 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 689 (1988), citing *Celotex Corporation v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-543, 91 L.Ed.2d 265 (1986).

2. § 1983 creates a species of tort liability to protect individuals whose constitutional rights have been violated. *Memphis Community School District v. Stachura*, —— U.S. ——, 106 S.Ct. 2537, 2542, 91 L.Ed.2d 249 (1986).

3. Damages may be recovered from municipalities under 42 U.S.C. § 1983 ("§ 1983"). *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 632 L.Ed.2d 673 (1980).

4. A person is entitled to the same First Amendment rights whether the First Amendment activity in question is engaged in for profit or not for profit. *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396,

1410 n.10 (9th Cir. 1985), *aff'd*, 476 U.S. 488, 106 S.Ct. 1034, 90 L.Ed.2d 480 (1986).

5. Lost profits may be claimed under § 1983. *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir. 1986), *aff'd mem.*, —— U.S. ——, 107 S.Ct. 919, 93 L.Ed.2d 972 (1987).

6. The purpose in allowing damages for § 1983 claims is to compensate for actual harm done. *Stachura, supra*, 106 S.Ct. at 2543.

7. The 'value' or 'importance' of constitutional rights are not elements of compensatory damages claims in § 1983 cases; such factors are abstract and cause uncertainty in the calculation of damages. *Stachura*, 106 S.Ct. at 2545.

8. If plaintiff establishes operating experience sufficient to allow a reasonable estimate of probable income and expense, damages from lost profits are awardable. *Edwards v. Container Kraft Carton*, 161 Cal.App.2d 752, 760, 327 P.2d 622 (1958).

9. Plaintiff Preferred Communications, Inc. has failed to make a sufficient showing that it has enough operating experience to allow a reasonable estimate of its probable income and expense had it been awarded a cable franchise by the City of Los Angeles. Thus, plaintiff may not claim damages in the form of lost profits.

10. Any Conclusion of Law deemed to be a Finding of Fact shall be treated as a Finding of Fact.

This order does not preclude plaintiff from recovering compensatory damages upon proof of such damages.

IT IS SO ORDERED.

Dated: 5/23/89

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
Judge
United States District Court

[Filed Jun. 7, 1989]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 83-5846 (CBM)

PREFERRED COMMUNICATIONS, INC.,
Plaintiff,

v.

CITY OF LOS ANGELES and DEPARTMENT OF WATER AND POWER,
Defendants.

ORDER RE STANDING

This matter came on for hearing on March 20, 1989 before the above-entitled Court, the Hon. Consuelo B. Marshall, Judge presiding, on, inter alia, the motion of defendants City of Los Angeles and Department of Water and Power ("defendants") for summary judgment as to plaintiff's lack of standing.

Having reviewed the relevant papers and documents and having heard oral argument, the Court hereby DENIES defendants' motion.

Standing must exist, and therefore may be examined, at all stages of the proceeding, and not merely when the action is initiated or during an initial appeal. *Safir v. Dole*, 718 F.2d 475, 481 (D.C. Cir. 1983), citing *DeFunis v. Odegaard*, 416 U.S. 312, 319, 94 S.Ct. 1704, 1707, 40 L.Ed.2d 164 (1974).

The sole case upon which defendants rely in bringing the instant motion is *Nor-West Cable Communication, Partnership v. City of St. Paul*, 3-83 CIV 1228 (D.Minn.

1988). After a trial on the merits and based on the special verdict rendered by the jury that plaintiff Nor-West did not have the "financial ability, technical capabilty, or the intent necessary to design, construct, or operate a cable television system" at the time of trial, the Court found, inter alia, that plaintiff lacked the necessary Article III standing to assert that its first amendment rights had been violated. *Id.* at p. 6.

However, as *Nor-West* is an unpublished court opinion from a different circuit, it has no binding effect on this Court.

Plaintiff challenges the constitutionality of the City's franchising ordinances. Plaintiff has been barred from access to the City's utility facilities because of plaintiff's refusal to participate in the City's franchising procedure. The Court finds that plaintiff has "show[n] that [it] has . . . suffered some actual or threatened injury as a result of the putatively illegal conduct of defendant[s]," *Valley Forge Christian College v. American United for Separation of Church & State,* 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed. 700 (1982) citing *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979), "and that the jury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge,* 102 S.Ct. at 758 citing *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924-25, 48 L.Ed.2d 450 (1976).

Accordingly, the Court finds that plaintiff has standing to assert its first amendment rights in this case.

IT IS SO ORDERED.

Dated: 6/5/89

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
Judge
United States District Court

CHARTER OF THE CITY OF LOS ANGELES

Sec. 3. The rights and powers granted by this charter shall be subject to the restrictions set forth in this section, or elsewhere in this charter. (Added, 1925.)

* * * *

(8) (a) The city may grant franchises for fixed terms, permits or privileges, for the construction and operation of plants or works necessary or convenient for furnishing the city and its inhabitants with transportation, communication, terminal facilities, water, light, heat, power, refrigeration, storage, or any other public utility or service; may prescribe the terms and conditions of any such grant, and may prescribe by ordinance approved by a vote of the people, the method of procedure for making such grants, subject to the limitations elsewhere contained in this charter; except that the Council shall adopt an ordinance which shall establish the procedure for granting to the holder of an existing franchise, any franchise required for the extension of facilities, ordered by the city, as authorized in pargraph (c) of this subdivision, or for granting a new franchise for a period not exceeding ten years, to replace a franchise about to expire, as authorized in paragraph (d) of this subdivision; provided that such procedure ordinance and every ordinance granting any such franchise shall be subject to the referendum. (Added, 1925.)

[Citations omitted]

ORDINANCE NO. 58,200

An Ordinance prescribing the method of procedure for the granting of franchises, permits and privileges across, under and over streets, highways and other places in the City of Los Angeles, and replacing Ordinance No. 27,557 (New Series), submitted to and approved by a vote of the people at the general municipal election held June 3, 1913.

The People of the City of Los Angeles do ordain as follows:

Section 1. No person, firm or corporation shall exercise any franchise, permit or privilege mentioned in this ordinance except in so far as such person, firm or corporation may be entitled to do so by direct and unlimited authority of the constitution of the State of California or of the constitution or laws of the United States, in, upon, over, under or along any street, highway or other place in the City of Los Angeles unless such person, firm or corporation shall have obtained a grant therefor in accordance with the provisions of the charter of said city and of the procedure prescribed by this ordinance and in accordance with the provisions of the ordinance granting such franchise, permit or privilege.

Sec. 2. Every franchise, permit or privilege hereinafter enumerated in this section shall be granted by ordinance in accordance with the method of procedure prescribed by this ordinance. The franchises, permits or privileges contemplated by this ordinance shall include:

1. Every franchise, permit or privilege to construct, maintain or operate a street railroad along, upon, over, in, under or across any street, lane, alley, court, highway, road or other public place.

2. Every franchise, permit or privilege to construct, maintain or operate an interurban railroad along, upon, over, in, under or across any street, lane, alley, court, highway, road or other place, and

whether the same is to be operated on the surface, in subways or upon an elevated structure.

3. Every franchise, permit or privilege to construct, operate or maintain an underground street railroad through subways, and for the construction, operation and maintenance of elevated street railways, along, across, under, in or over any street, highway, lane, court, alley or other place; every franchise, permit or privilege to construct, maintain or operate pipes, tubes, tunnels, or conduits along, upon, over, in, under or across any lane, street, alley, court, highway, road or other pubilc place in said street, for the purpose of transmitting water, gas, steam, heat, oil, air, substances for refrigerating, containers with merchandise through compressed air tubes or other substances or utility.

4. Every franchise, permit or privilege to erect, construct, lay, maintain and operate, poles, pipes, conduits, wires or cable upon, over, under, in, across or along any street, lane, court, highway, road or other place in said city for the purpose of transmitting power, heat, electricity or electric energy or for communication by telephone, telegraph or signal systems.

5. Every franchise, permit or privilege for the construction and operation of any other plants necessary or convenient for furnishing the city and its inhabitants with transportation, communication, terminal facilities, water, light, heat, power, refrigeration, storage or any other public service.

Nothing in this ordinance shall be construed as applying to the granting of franchises, permits and privileges granted or to be granted by the Board of Harbor Commissioners as contemplated by Section 140 of the charter of the City of Los Angeles.

Sec. 3. Every applicant for a franchise, permit or privilege mentioned in Section 2 of this ordinance shall

file, or heretofore shall have filed, with the Council application therefor in writing setting forth in such application the name and address of such applicant, a description of the franchise, permit or privilege applied for, and the streets, highways or other places along, upon, over, in, under or across which it is proposed to exercise such franchise, permit or privilege.

Sec. 4. Every application made to the Council for a franchise, permit or privilege mentioned in this ordinance shall, before any action is taken thereon, be referred by the Council to the Board of Public Utilities & Transportation for its recommendation respecting the same. The Board of Public Utilities & Transportation shall proceed to inquire into such application and, within thirty (30) days after such application shall have been referred to it, or longer if allowed by the Council, shall report to the Council its recommendation relative thereto. If, in the judgment of said Board of Public Utilities & Transportation, the franchise, permits or privilege applied for should not be advertised for sale or granted, it shall so report, stating its reasons therefor; and if, in the judgment of said board, such franchise, permit or privilege should be granted, it shall recommend the terms and conditions upon which the same shall be granted.

No franchise, permit or privilege mentioned in this ordinance shall be advertised for sale or granted unless the application therefor shall have been referred to the Board of Public Utilities & Transportation: provided however, that if said board shall fail to report thereon within the time prescribed, or as extended by the council, nothing herein contained shall be construed to prevent the council, at is discretion, from proceeding to advertise such franchise, permits or privilege for sale or from awarding the same as provided by this ordinance.

No franchise, permits or privilege mentioned in this ordinance shall be offered for sale or granted, contrary to the recommendation of said Board of Public Utilities &

Transportation, except upon a three-fourths (¾) vote of the entire council.

Sec. 5. 1. The council shall, if it proposes to grant any such franchise, permit or privilege, advertise the fact of such application, together with the statement that it is proposed to grant the same, once in a newspaper of general circulation, printed, published and circulated in said city.

2. Such advertisement shall state the character of the franchise, permit or privilege proposed to be granted, and, if it be for a street railroad or an interurban railroad, or an underground or elevated street or interurban railroad, the route to be traversed, shall state the amount of the bond required to be filed by the grantee to insure the faithful performance of the conditions of such franchise: shall state, (except in the case of a franchise granted for ten (10) years to replace a franchise about to expire), that sealed bids theefor will be opened at a stated time and place, and that the franchise, permit or privilege will be awarded to the bidder offering:

(a) To pay to the city during the life of the franchise, permit or privilege, the highest percentage of gross annual receipts received from the use, operation or possession of such franchise, permit or privilege: provided, that such percentage of gross annual receipts shall not be less than two per cent (2%) of such gross annual receipts; or

(b) To pay to the city such other compensation or consideration for the use, permit or privilege as may be prescribed by the Council in the advertisement for bids and notice of sale; provided, that subdivision (a), clause 2 of section 5 of this ordinance shall not be included in any advertisement for bids for any franchise granted to any interstate, steam railroad or franchise for oil, gas or other pipe line, or for any other franchise where, in the

opinion of the Board of Public Utilities & Transportation, it is impractical to compute net or gross receipts, for that portion of the railroad, pipe line or other privilege covered by said proposed franchise; provided, that the Council may, in said advertisement for bids and notice of sale, invite bids or any one, or all, or any part of the bases prescribed under paragraphs (a) and (b) of section 2, of section 5 of this ordinance.

(c) The terms and conditions to be imposed upon the grantee on account of the use, operation or possession of such franchise, permit or privelege, shall be included in said advertisement for bids and notice of sale.

3. The procedure for receiving bids and awarding any franchise, permit or privelege shall be as follows:

All sealed bids shall be delivered to and filed with the City Clerk, and at the time and place specified in said advertisement the Council shall, in open session, examine and publicly declare the same: provided, however, that no bid shall be considered unless accompanied by a cash deposit or a certified check as hereinafter provided.

Upon the opening and declaration of such bids by the Council, any responsible person, firm or corporation present or represented, then accompanying his or its bids with a cash deposit or certified check equivalent to that required to be filed with sealed bids may raise the bid for such franchise, permit or privelege above the highest sealed bid therefor, on any one of the bases of compensation as prescribed under subsection 2, Section 5 of this ordinance, and included in the advertisement for bids and notice of sale. Such bidding may thereafter continue until finally such franchise permit or privilege shall be struck off, sold, and awarded by the Council to the highest bidder: provided that if, in the judgment of the Council, no adequate or responsible bid has been made, the Counciy may withdraw any franchise, permit or privilege from sale, or advertisement for new bids.

Every application for a franchise, permit or privilege shall be accompanied by a cash deposit of no less than Two Hundred Dollars ($200.00) or by a certified check for said amount, payable to the City Treasurer and certified to by some responsible bank in the City of Los Angeles as a fund out of which to pay all expenses connected with such application, and every bid shall be accompanied by a cash deposit of not less than Five Hundred Dollars ($500.00), or a certified check for said amount, payable to the City Treasurer, ceritfied to by some responsible bank in the City of Los Angeles as a guarantee of good faith by the bidder.

Upon the franchise, permit or privilege being awarded, all deposits made by unsuccessful bidders shall be returned. The deposit of the successful bidder shall be retained until the approval and filing of a bond hereinafter provided for, whereupon the Five Hundred Dollar deposit shall be returned and the remainder, if any, of the Two Hundred Dollars after the payment therefrom of all expenses incurred by the city in connection with the advertising, engineering, clerical work and awarding of such franchise, permit or privilege, shall be returned.

5. No clause or condition of any kind shall be inserted in any advertisement of any franchise, permit or privilege offered for sale under the terms of this ordinance which shall directly or indirectly restrict free and open competition in bidding therefor.

Sec. 6. The grantee of such franchise, permit or privilege shall, within five (5) days after the awarding of such contract, permit or privilege, file with the City Clerk of the said city a bond running to the said city in the penal sum fixed by the Council in the advertisement for bids and within thirty (30) days after the filing and approval of such bond, such franchise, permit or privilege shall be granted by ordinance, subject to the referendary provisions of the charter to the person, firm or corporation to whom it shall have been struck off, sold or awarded; and in case such bond shall not be so filed the award of such

franchise, permit or privilege shall be set aside and shall, in the discretion of the Council, be readvertised and again offered for sale in the same manner and under the same restrictions as hereinbefore provided, and the amount deposited by such bidder with his bid shall be forfeited to the city as liquidated damages.

Sec. 7. Permits may be granted by the Council by ordinance, for the construction and maintenance of spur tracks or side tracks and the running of cars thereon for the purpose of connecting warehouses, manufactories or other business industries and enterprises with any line of railroad or railway within the city, upon such terms and subject to such regulations and conditions as may be prescribed from time to time by ordinance, such tracks to be used for the transportation of freight only, and not to be used for the purpose of excavating or filling in a street or portion of a street, or the adjoining land, and for such limited time as may be necessary for such purpose and no longer. Such tracks must be laid and operated in such manner and under such restrictions as not to unreasonably interfere with the use of a street by the public.

1. No such permits shall be revoked until after a hearing before the Board of Public Utilities & Transportation and its recommendation approved by a three-fourths vote of the Council. The Council need not advertise for sale any permit granted under the conditions of this section.

Provided, that each such application shall first be referred to the Board of Public Utilities & Transportation for its recommendations, and proceedings taken as to such reference in accordance with the provisions of Section 4 of this ordinance.

Nothing in this section, however, shall be construed as preventing the granting of a franchise for any of the purposes mentioned above where application is made therefor in compliance with the provisions of this ordinance.

Sec. 8. Every franchise, permit or privilege for the construction, extension or operation of a utility requiring a franchise shall reserve to the city certain rights and privileges, as follows:

1. The right to revoke—for non-compliance with any of the conditions of the franchise.

2. The right to purchase the property of such utility or to find a purchaser therefor in accordance with the following procedure:

(a) The City may purchase any utility at any time after five (5) years from the date that such franchise becomes effective, by delivering a notice in writing of such intention to purchase, at least one (1) year prior to the date upon which the city proposes to exercise its right to purchase said utility; together with a notice in writing of the intention of said city to purchase and take over said property of such utility at the date fixed for the purchase of said utility, or to find a purchaser therefor, upon the payment by said city, or said purchaser, to said grantee owning such property under said franchise of the fair value of the property of such utility, as hereinafter provided.

(b) That in the event the City of Los Angeles shall elect to purchase said utility and shall notify said grantee in writing of its intention to purchase and take over the property of such utility, or to find a purchaser therefor, as herein provided, said grantee, at the period fixed in said notice for the termination of said franchise and upon payment or tender of payment by the city, or by said purchaser, to said grantee of the purchase price of said property of such utlity, as hereinafter provided, shall transfer the title to said property by good and sufficient written instrument to said city or to said purchaser, and the payment or tender of payment by said city or said purchaser, to said grantee of the said purchase price

of the property of such utility shall, ipso facto, operate to transfer the title of said property to said city or to said purchaser, and the grantee shall forthwith surrender to said city or to said purchaser, and the city or said purchaser may forthwith take and hold possession of the property of such utility.

(c) That in the event said franchise shall expire by operation of law, said city shall have the right, at its option, declared not more than one (1) year before the expiration of the franchise term as herein fixed, which right an option is hereby reserved to said city, to purchase and take over the property of such utility, and in the event that said city shall so exercise its right under such option the said city shall pay to the said grantee the fair value of the property of such utility as herein provided.

(d) The term "fair value" as used herein shall be construed to mean the reasonable value of the property of such utility having regard to its condition of repair and its adaptability and capacity for the use for which it shall have been originally intended. The price to be paid by the City for any utility shall be on the basis of actual cost to the utility for the property taken, less depreciation accrued, as of the date of purchase, with due allowance for obsolescence, if any, and the efficiency of its units to perform the duties imposed on them; no allowance shall be made for franchise value, good will, going concern, earning power, increased cost of reproduction or increased value of right of way or allowance for damages by reason of severance.

(e) That the valuation of the property of such utility proposed to be purchased upon the termination of said franchise as herein provided, or otherwise, shall be determined by a board of three arbitrators of whom one shall be appointed by the city, one by the grantee, and the third by the two

arbitrators so appointed. Said arbitrators shall be appointed within thirty days after the declaration by the city of its option to purchase said property of such utility, or to find a purchaser therefor. In case said arbitrators fail to make and file an award within the time hereinafter limited, a new board of three arbitrators shall be appointed as hereinbefore prescribed. The board of arbitrators shall immediately upon the appointment of its members enter upon the discharge of its duties. Any vacancy in the board of arbitrators shall be filled by the party who made the original appointment to the vacant place.

(f) In the event the grantee shall fail to appoint an arbitrator within thirty days after the declaration by the city of its option to purchase the property of such utility or to find a purchaser therefor, or in the event of the death or designation of such arbitrator so appointed and such grantee, its successors or assigns, shall fail to appoint an arbitrator to fill such vacancy within ten (10) days thereafter, or in the event the two arbitrators appointed by the city and grantee, as hereinbefore provided, shall fail to appoint a third arbitrator within sixty (60) days after the declaration of the city of its option to purchase the property of such utility, or to find a purchaser therefor, then upon application made either by the city or by said grantee after (5) days' notice in writing to the other party, such arbitrator shall be appointed by the preciding Judge of the Superior Court of the State of California, in and for the County of Los Angeles, and the arbitrators so appointed shall have the same powers and duties as though he had been appointed in the manner hereinabove prescribed.

(g) The award of the arbitrators must be made and filed with the City Clerk of said city within three (3) months after their appointment, and a majority of the arbitrators who agree thereto may make such

award. The amount of the valuation of the property of such utility to be paid to said grantee, as herein provided, in lawful money of the United States, less an amount equivalent to or sufficient to offset or pay any outstanding unsettled, unpaid or disputed debts, claims or incompleted or unsettled contracts or pending damage suits or judgments against or affecting said grantee, or any encumbrances or defects in title which may constitute a charge or lien upon the property of such utility. The amount so deducted or reserved shall be placed by the city, if the property of such utility be purchased by the city in a special valuation of the property over the par value of the bonds so assumed shall be the purchase price to be paid to the grantee by the city for said property.

Sec. 9. Every indeterminate franchise for the construction, extension or operation of a utility, shall be granted in accordance with the conditions set forth in Section 3 of Article 1 of the charter, as well as those hereinbefore in this ordiance contained, and such as shall be prescribed by the Council.

Sec. 10. Every grant of every such franchise, permit or privilege shall provide that the Board of Public Utilities & Transportation (subject to appeal to the Council) shall have the power to order extensions of the facilities authorized therein, provided that the Board of Public Utilities & Transportation shall have determined, after a hearing duly had and of which the utility has had due notice at least thirty (30) days prior to such hearing, that public necessity and convenience require the extension: provided, however, that if such extension of facilities is for construction or operation outside of the original franchise to which it will connect (except extensions granted to indeterminate franchises which extensions shall become a part of the aggregate property of such grantee and shall be subject to all the obligations and rights in favor of the city applicable to the property of the grantee

by virtue of such indeterminate franchise), then the utility shall not be required to comply with such order until the Council shall have granted such additional franchise rights as may be required to cover such extension.

Every such order for extension, by the Board of Public Utilities & Transportation, shall be subject to appeal to the Council. Such appeal shall be made within fifteen (15) days after the making of such order by filing a written notice thereof with the Council. Such notice shall state the grounds upon which the appeal is made and thereupon the Council shall consider such appeal and within thirty (30) days thereafter shall either affirm or revoke or modify such order of the Board; and unless such action is taken by the Council within said period of thirty (30) days the order of the Board of Public Utilities & Transportation shall become final.

Sec. 11. Fixed term franchise, permits or privileges shall not be granted for a longer period of time than twenty-one (21) years except in the case of franchises for the construction and operation of subways and elevated railways, or for a period exceeding ten (10) years for a franchise about to expire.

No fixed term franchises, permits or privileges for the construction or operation of elevated railways or subways shall be granted for a period exceeding forty (40) years for the original franchise, or for a period exceeding ten (10) years for a franchise about to expire, all in accordance with the provisions of paragraph (d), subsection 8, and section 3 of the charter.

Indeterminate franchises may be granted in accordance with provisions of this ordinance.

Re-settlement franchise for an indeterminate period may be granted to a public utility operating in the City of Los Angeles under more than one franchise issued for different periods and for different expiration dates, for different parts of its system, which re-settlement franchises,

shall be in lieu of all other franchises held by it within the corporate limits of Los Angeles. Such re-settlement franchise may be for an indeterminate or fixed term and filed by the grantee in conflict therewith. Such resettlement franchise shall be granted in accordance with the provisions of this ordinance.

Sec. 12. Nothing in this ordinance shall be construed as preventing the Council from inserting in any advertisement for bids and notice of sale, or in any ordinance granting any franchise, permit or privilege any conditions or requirements not inconsistent with the provisions of the constitution of the State, or of the City Charter.

Sec. 13. That Ordinance No. 27,557 (New Series), entitled "An ordinance prescribing the methods of procedure for the granting of franchises, permits and privileges across, under and over streets, highways and other places, in the City of Los Angeles," submitted to and approved by a vote of the people at the general municipal election held June 3, 1913, be and the same is hereby repealed.

Sec. 14. I hereby certify that the Council did, at its own instance, submit the foregoing ordinance to a vote of the qualified electors of the City of Los Angeles, at the General Municipal Election held in said City on Tuesday, the 7th day of June, 1927, and that on Monday, the 13th day of June, 1927, the Council of said City, by a resolution duly and regularly adopted, found, determined and declared that a majority of the votes cast at said General Municipal Election upon said ordinance, was cast in favor thereof, and that said ordinance was thereby adopted.

ROBT. DOMINGUEZ.

City Clerk of the City of Los Angeles.